DEPARTMENT OF LABOR - OPINIONS ON ERISA

The following selected DOL opinions are provided as a convenient reference source on ERISA matters of particular relevance to a corporate fiduciary. The opinions are arranged in the order of the applicable sections of ERISA to which they pertain.

ERISA Section 3(14) & 3(21)
Opinion 79-10A

(American Savings and Loan Association; Home Savings Association) Section 3(14); (21), 412(a). The reimbursement to participating plan trustees pursuant to a written agreement by the American Savings and Loan Association (American) for fees paid by the plans to PSI, the plan administrator and named fiduciary for participating plans, an unrelated party to American, does not render American a "fiduciary" or "party in Interest" with respect to the participating plans as defined in the Act. American's actions are not deemed to be a provision of services to participating plans, and American is not subject to the bonding requirements of Section 412 of the Act.

A similar opinion was reached with respect to the Home Savings Association, whose accounts are subject to regulation by the Texas Savings and Loan Commissioner (American), and who participate in an identical situation to that of American.

A savings and loan association is neither a fiduciary nor a party in interest under a plan arrangement developed and sold by the savings and loan association to employers, in which unrelated parties are administrator and trustee and investments in the savings and loan associations are subject to the discretion of the trustee alone.

A bank which provides merely custodial services regarding plan assets is not a fiduciary under 3(21)(A). However, It is a party in interest under 3(14)(B) because of such services.

ERISA Section 404
Opinion A/0 76-32

404(a)(1)(A). A bank which is, simultaneously the major secured creditor of the issuer of securities comprising a significant portion of the plan's assets and the trustee of the plan itself, cannot act "solely in the interest of the plan's participants and beneficiaries" as required by Section 404(a)(1). Such conflict must be promptly remedied or the Department will take appropriate action.

Opinion: Honorable Harrison A. Williams, Jr.

404(a)(1)(B). The prudence of a particular plan investment should be judged in the context of its role in the plan's total Investment portfolio in light of the following factors: diversification, volatility, liquidity, expected return of the whole portfolio and prevailing and projected economic conditions of the entity in which the plan proposes to invest. (This letter based on content of proposed regulation. The final regulation reduces the conditions to: diversification, liquidity and projected return.)

Opinion 76-74

404(a)(1)(C). Responding to a request for a ruling as to whether ERISA imposes limits on the amount or percentage of plan assets that may be place in a particular investment vehicle is governed by the general standards of fiduciary responsibility of Section 404(a)(1), investment vehicle is governed by the general standards of fiduciary responsibility of Section 404(a)(1), including the diversification requirements. The Conference Report further discusses the diversification standards of the Section. The Department notes that the only specific limitation on the percentage amount of particular assets a plan may hold relates to the holding or acquisition of qualifying employer securities or real property in Section 407.

Opinion 76-70

404(a)(1)(C). The Department will not issue a ruling as to whether particular investments constitute a diversification within the meaning of Section 404(a)(1)(C), since it does not issue rulings on matters of an inherently factual nature. The Department is unable to issue a ruling on whether a plan's portfolio is diversified within the meaning of the Section if 100% of its assets are invested in diversified fixed income securities since regulations have not yet been promulgated. It notes, however, that insurance companies have traditionally held over 70% of their assets in fixed income securities and that investing plan assets wholly in insurance contracts would not violate the diversification rules.

Opinion 77-46 National Association of Mutual Savings Banks

404(a)(1)(C). Investment of individual account plan assets in mutual savings bank accounts where the balances exceed the amount covered by federal insurance will not contravene the diversification requirement of Section 404(a)(1)(C) if the bank invests its funds in a diversified manner so as to minimize the risk of loss. The Department will not define the scope of participant "control" allowed under Section 404(c) pending issuance of regulations under that Section.

Opinion 77-46 National Association of Mutual Savings Banks

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Opinion 75-103

406(a)(1)(A) & (D). An indirect prohibited transaction can occur where a transaction between a plan and an unrelated third part is part of an arrangement, agreement or understanding that the proceeds of the transaction received by the third party will be used for the benefit of a party in interest. Where the proceeds of the transaction with the plan are used by the third party in its normal business operations and the benefit that flows to a party in interest is not part of a commitment but merely incidental to the business operations such benefit would not constitute a prohibited transaction. Where the plan has acquired a mortgage and simultaneously agreed to a servicing arrangement by the seller, future purchases from the same party would be prohibited transactions based on the party in interest relationship created by the servicing arrangement.

Opinion 76-62

406(a). The investment of assets of a plan in a bank of which a director of the bank is also a trustee of the plan would not be prohibited under Section 406(a) of the Act because the bank by this relationship alone is not a party in interest with respect to the plan. However, there may be 406(b)(1) and (2) violations depending upon the facts and circumstances.

Opinion 76-76

406(a), (b). The bank which performs the services of a custodial agent for securities it purchases for a pension trust, at the sole discretion of the trust is a party in interest within the meaning of Section 3(14)(A) and (B). If one of the trustees, who is also a director of the bank, instructs the bank to purchase shares of the bank's stock for the trust in the over-the-counter market, a prohibited transaction under Section 406(a) may occur. Moreover, if the bank has any discretion in plan investment transactions, e.g., selection of broker/dealers which would cause it to be fiduciary under Section 3(21), it would be subject to any potential liability as a co-fiduciary. With respect to the trustee/bank director, the proposed transaction should also be considered in light of the provisions of Section 406(b).

Opinion No. 79-11A

406(b)(1). Section 406(b)(1) violations may occur when an employee benefit plan has assets consisting of stock held by a fiduciary (e.g., a bank with discretionary investment authority) which are in turn loaned by that fiduciary and the fee generated by the loan arrangement is based on the duration or amount of stock involved in the loan. The violations may occur either where that fiduciary has investment discretion regarding the continued holding of that stock or where the fiduciary has discretion as to the number or duration of the loan transactions which may be entered into pursuant to the general authority for the overall arrangement.

ERISA Section 407
Opinion No: 79-45A

407(d)(5). A "convertible debenture" which cannot satisfy the definition of a marketable obligation under 407(e) of the Act does not satisfy the definition of a qualifying employer security under 407(d)(5) as a "stock" by its potential to be convertible to common stock.

ERISA Section 408
Opinion: Riggs National Bank Amended Pension Plan
(INFORMATION LETTER)

408(b)(2) & (4). A bank that proposes to serve as trustee for its employees' pension plan without compensation is advised that Sections 402(c)(1), 408(c)(3) and 408(b)(4)(A) seem to imply that an employer may serve as trustee. If the Department notes that, under regulation 408b-2(e)(3), provision of a fiduciary service does not, in itself, constitute an act described in Section 406(b) where no compensation is paid.

Opinion No: D-818 Inland Container Corporation

408(b)(2). Where a bank, in the course of exercising discretionary authority with respect to plan assets, causes a plan to acquire participations in loans made by the bank and guaranteed by a party in interest a prohibited extension of credit will have occurred. The bank services the loans by handling the collection procedure at no charge to the plan; however, should the bank pursue legal remedies, in the event of a default, disbursements incurred by the bank would be ratably apportioned among owners of participation interests. Issues with respect to the provision of services:

1. The mere fact that the plan may terminate the bank's servicing arrangement only by selling their participation interest in the notes does not, in and of itself, mean that the services are not furnished under a contract or arrangement which is reasonable.

2. Where the services provided are not separately purchased either at the time the participation interest is acquired or as part of a distinct servicing agreement, then the provision of such service does not in and of itself, constitute an act described in Section 406(b) of the Act.

3. Only direct expenses may be charged to a plan by a fiduciary under the service provide regulation without a violation of Section 406(b) of the Act. Direct expenses represent expenses incurred by the provider regardless of whether the service was actually provided the plan or which represent on allocable portion of overhead costs.

Opinion No: 79-25A

408(b)(4). Where plan assets are to be invested in time deposits of banks which serve as fiduciaries with respect to those assets and the plans cover employees of employers other than the bank or similar financial institution, prohibited transactions may occur. However, Section 408(b)(4) and implementing regulations establish certain guidelines to avoid violations of Section 406(a), (b)(1) and (2) of the Act.

Where investment authority is with the bank or similar financial institution (or employees of such) prior to November 1, 1977, any authorization to make investments contained in a plan or trust instrument would satisfy the requirement of an express authorization for investments. Effective November 1, 1977, where a bank or similar financial institution invests plan assets in deposits in itself or its affiliates under an authorization contained in a plan or trust instrument, such authorization must name such bank or similar financial institution and state that the bank or similar financial institution may make investments in deposits which bear a reasonable rate of interest in itself (or in an affiliate). Where the investment is authorized (or made) by a fiduciary other than the bank, no 406(b) violation will occur if such fiduciary has no interest in the transaction which would affect the exercise of his best judgement as a fiduciary.

Opinion No: 79-76A

408(b)(4). A defined benefit pension plan sponsored by a bank or similar financial institution could acquire certificates of deposit in itself and not be bound by the Section 407(a)(2) and (3) prohibitions against acquiring and holding qualifying employer securities in excess of 10 percent of the fair market value of plan assets provided the requirements of Section 408(b)(4) and the implementing regulation are complied with.

Opinion No. 79-73A

408(b)(6). The statutory provisions of Section 408(b)(6) exempt from the prohibition of Section 406(a) and (b)(1) and (2) the provision of certain ancillary services to a plan by certain banks or similar financial institutions. This exemption would not extend to loans or other extensions of credit made by the bank to facilitate plan investment objectives.

Opinion No: 77-45

408(c)(3). A fund trustee (a fiduciary), who is a bank director (a party in interest within the meaning of 3(14)(A)), may not be subject to the liability of Section 406. While Section 408(c)(3) would permit an individual to hold both positions, it would not protect against the possible prohibited transactions which might occur under Section 406(b). To avoid these problems, the individual should abstain from discussions and voting concerning the fund or the bank when acting as director or trustee.